

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

VIRGIL L. CARLSON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. C08-5119BHS

ORDER DENYING  
PLAINTIFF'S MOTION TO  
VACATE U.S. ATTORNEY'S  
CERTIFICATION AND  
REMAND

This matter comes before the Court on Plaintiff's Motion to Vacate U.S. Attorney's Certification and Remand Case to State Court (Dkt. 5). The Court has considered the pleadings filed in support of and in opposition to the motion, the declarations submitted in support and opposition to the motion, and the remainder of the file herein and hereby denies Plaintiff's motion for the reasons stated herein.

**I.**

**PLAINTIFF'S MOTION TO STRIKE  
PORTIONS OF MARR DECLARATION**

Plaintiff has made an apparent motion to strike certain portions of the Declaration of Harrison Marr (Dkt. 13). Plaintiff contends that certain sections of Mr. Marr's declaration "are not relevant or based on personal knowledge" and contain "impermissible legal opinions." Dkt. 15 at 3. The Court finds that with respect to

1 statements on page 2, lines 2-13, and page 2, lines 24-27, Plaintiff's motion to strike  
2 should be denied. However, with respect to the statements contained on page 3, lines 1-5,  
3 the Court finds these statements reflect Mr. Marr's interpretation of facts he does not have  
4 personal knowledge of and do contain impermissible legal opinions and therefore should  
5 be disregarded.

## 6 II.

### 7 **PLAINTIFF'S MOTION TO VACATE** 8 **U.S. ATTORNEY'S CERTIFICATION**

9 This matter comes before the Court in conformity with the Federal Tort Claims  
10 Act (FTCA), specifically 28 U.S.C. § 1346(b) and 28 U.S.C. § 2679(d)(2), upon removal  
11 from state court pursuant to certification under 28 U.S.C. § 2675(a), known as the  
12 Westfall Act, finding that the injuries sustained by Plaintiff, which form the basis of his  
13 claims, were allegedly caused by an employee of the United States Postal Service (USPS)  
14 while acting within the scope of his employment. Upon this certification, the United  
15 States was substituted for Mr. Langer, the Defendant in state court. Dkt. 1. Plaintiff is  
16 now challenging the United States Attorney's certification that Mr. Langer was acting  
17 within the scope of his employment when he allegedly caused Plaintiff's injuries by  
18 making contact with Plaintiff's chair, thereby moving it from underneath him, causing  
19 Plaintiff to fall to the ground when he attempted to sit down. Dkt. 5.

20 A United States Attorney's certification regarding the scope of a federal  
21 employee's employment is reviewable by this Court. *Martinez v. Lamagno*, 515 U.S. 417,  
22 436-437 (1995). Certification by the United States Attorney is prima facie evidence  
23 creating a rebuttable presumption that a federal employee was acting within the scope of  
24 his employment. *Pauly v. U.S. Dept. of Agriculture*, 348 F.3d 1143, 1150-51 (9th Cir.  
25 2003); *Billings v. U.S.*, 57 F.3d 797, 800 (9th Cir. 1995). The challenging party bears the  
26 burden of proof by a preponderance of the evidence. *Id.*

1 The Court's analysis of the scope of employment question is "controlled by the  
2 law of the place where the allegedly tortious acts occurred." *Simmons v. U.S.*, 805 F.2d  
3 1363, 1368 (9th Cir. 1986). Pursuant to the Restatement (Second) of Agency § 228:

4 (1) Conduct of a servant is within the scope of employment if, but  
5 only if:

6 (a) it is of the kind he is employed to perform;

7 (b) it occurs substantially within the authorized time and space  
limits;

8 (c) it is actuated at least in part, by a purpose to serve the  
9 master, . . . ;

10 (2) Conduct of a servant is not within the scope of employment if it  
is different in kind from that authorized, far beyond the authorized time or  
11 space limits, or too little actuated by a purpose to serve the master.

12 This is further supplemented by Restatement (Second) of Agency § 229 (1958), which  
states in pertinent part:

13 (2) In determining whether or not the conduct, although not  
14 authorized, is nevertheless so similar to or incidental to the conduct  
authorized as to be within the scope of employment, the following matters  
15 of fact are to be considered:

16 (a) whether or not the act is one commonly done by such servants;

17 (b) the time, place and purpose of the act;

18 (c) the previous relations between the master and the servant;

19 (d) the extent to which the business of the master is apportioned  
between different servants;

20 (e) whether or not the act is outside the enterprise of the master or, if  
21 within the enterprise, has not been entrusted to any servant;

22 (f) whether or not the master has reason to expect that such an act  
will be done;

23 (g) the similarity in quality of the act done to the act authorized;

24 (i) the extent of departure from the normal method of accomplishing  
25 an authorized result; . . . .

26 See also *Hays v. Lake*, 36 Wn. App. 827, 829 (1984); *Sanders v. Day*, 2 Wn. App. 393,  
27 397 (1970). The Washington Supreme Court has further stated that:

1           The test in Washington for determining whether the employee was,  
2           at any given time, in the course of his employment, is whether the employee  
3           was, at the time, engaged in the performance of the duties required of him  
4           by his contract of employment, or, as sometimes stated, whether he was  
5           engaged at the time in the furtherance of the employer's interest. In  
6           following this test we have emphasized the importance of the benefit to the  
7           employer in determination of the scope of employment.

8           *Dickinson v. Edwards*, 105 Wn.2d 457, 467 (1986).

9           In the instant matter, as described in the depositions of Plaintiff and Mr. Langer  
10          (Dkts. 6, 12-2, 12-3), both Plaintiff and Mr. Langer were in the USPS break room  
11          watching the 2005 world series. USPS workers at the location employing Plaintiff and  
12          Mr. Langer are required to take two 15-minute breaks a day; they are paid for this time,  
13          and they are not allowed to leave the premises. A break room is provided to the  
14          employees and the events giving rise to Plaintiff's cause of action took place in the break  
15          room. Plaintiff has severe hearing problems and when he entered the break room Mr.  
16          Langer tried to audibly get his attention. Plaintiff did not hear Mr. Langer's attempts.  
17          Plaintiff pulled out a chair to sit in at a position in front of Mr. Langer but remained  
18          standing for a few minutes. Mr. Langer, in an attempt to get Plaintiff's attention, made  
19          contact with Plaintiff's chair thereby moving it from its original position behind Plaintiff.  
20          Mr. Langer then got up and attempted to reposition the chair in its original position.  
21          Plaintiff subsequently attempted to sit down and missed the chair. Plaintiff fell to the  
22          floor and sustained injuries from this fall.

23          Plaintiff contends that Mr. Langer was not acting within the scope of his  
24          employment because he was not performing the duties of a mail handler when the  
25          incident occurred, he was not acting within the furtherance of the USPS business, and  
26          because Mr. Langer intentionally kicked Plaintiff's "chair away by reason of his ill will,  
27          jealousy, hatred, or other ill feelings." Dkt. 5 at 5-7. Plaintiff cites *Kuehn v. White*, 24  
28          Wn. App. 274 (1979), for this last proposition and contends that this case is analogous to  
29          the instant matter. *Id.* at 5. In *Kuehn*, a truck driver cut off another motorist and then  
30          encroached on the motorist lane forcing him to change lanes. 24 Wn. App. at 275-76.

1 The motorist indicated that he wanted the truck driver to pull over several times while  
2 these vehicular altercations were taking place and eventually both the truck driver and the  
3 motorist pulled over to the side of the road. *Id.* The truck driver then proceeded to get out  
4 of his truck and assault the driver with a lead pipe. *Id.* The record before the Court in the  
5 instant matter does not contain anything beyond Mr. Langer's admission that he  
6 intentionally kicked Plaintiff's chair in order to get his attention and then subsequently  
7 attempted to move the chair back to its original position. Dkt. 6 at 29-30. The Court does  
8 not find that *Keuhn* is applicable to the instant matter. The record in *Keuhn* clearly shows  
9 that the truck driver had stepped away from his master's business and was motivated by  
10 "his ill will, jealousy, hatred, or other ill feelings, independent of the servant's duty." *Id.*

11 The Court finds that Mr. Langer's actions occurred within the time and space  
12 limits provided by his employer. He was on a paid break that he was required to take and  
13 was in the area provided by the USPS as a "break room." Dkt. 6 at 27. Also, these breaks  
14 were, at least in part, for the purpose of serving the USPS as it was a requirement that the  
15 breaks be taken, the breaks were paid breaks, and the employees were not allowed to  
16 leave the premises. *Id.* at 24. Furthermore, while Mr. Langer's acts were not the kind that  
17 he was employed to perform, the Court finds that they were incidental to his required  
18 duties. The purpose of a break period is to allow employees a period of time where they  
19 are relieved from their normal duties. However, these employees are required to take a  
20 break and the act of taking a break itself can be seen as a required duty. Therefore, the  
21 act of taking a break is in the furtherance of the employer's interests. Furthermore, while  
22 no regulations or rules on conduct had been specifically enumerated, the acts that did take  
23 place were not so intentional and removed from normal activities to go outside the scope  
24 of events that the employer might expect will be done.

25 The Court finds instead that the instant matter is analogous to *Robel v. Roundup*  
26 *Co.*, 148 Wn.2d 35 (2002). In *Robel*, employees were considered acting within their  
27 scope of employment when they verbally harassed another co-worker on company  
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1 property and during working hours. 148 Wn.2d at 54. Like in *Robel*, Mr. Langer's acts  
2 took place on company property, during work hours, and there is nothing in the record  
3 that shows that Mr. Langer was acting due to some exceptional personal motivation or  
4 animus that would take his acts outside of the scope of his employment. Under these  
5 circumstances, Plaintiff has not carried his burden of showing by a preponderance of the  
6 evidence that Mr. Langer was acting outside the scope of his employment that would  
7 rebut the presumption in favor of the United States Attorney's certification.

8 **III.**

9 **ORDER**

10 Therefore, it is **ORDERED** that Plaintiff's Motion to Vacate U.S. Attorney's  
11 Certification and Remand Case to State Court (Dkt. 5) is hereby **DENIED**. Plaintiff's  
12 motion to strike certain portions of the Declaration of Harrison Marr (Dkt. 13) is hereby  
13 **GRANTED in part and DENIED in part**. The statements contained on page 3, lines 1-  
14 5, of the Declaration of Harrison Marr are hereby **STRICKEN**.

15 DATED this 14<sup>th</sup> day of April, 2008.

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19 BENJAMIN H. SETTLE  
20 United States District Judge  
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